United Nations A/CN.9/768

General Assembly

Distr.: General
22 May 2013

Original: English

United Nations Commission on International Trade Law
Forty-sixth session
Vienna, 8-26 July 2013

Report of Working Group IV (Electronic Commerce) on the work of its forty-seventh session (New York, 13-17 May 2013)

Contents

V.13-83645 (E) 270513 280513

I. Introduction

1. At its forty-second session, in 2009, the Commission requested the Secretariat to prepare a study on electronic transferable records in the light of proposals received at that session (A/CN.9/681 and Add.1, and A/CN.9/682).[1]

2. At its forty-third session, in 2010, the Commission had before it additional information on the use of electronic communications for the transfer of rights in goods, with particular regard to the use of registries for the creation and transfer of rights (A/CN.9/692, paras. 12-47). At that session, the Commission requested the Secretariat to convene a colloquium on relevant topics, namely, electronic transferable records, identity management, electronic commerce conducted with mobile devices and electronic single window facilities.[2]

3. At its forty-fourth session, in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions at the colloquium on electronic commerce (New York, 14-16 February 2011).[3] After discussion, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.[4] It was recalled that such work would be beneficial not only for the generic promotion of electronic communications in international trade, but also to address some specific issues such as assisting in the implementation of the Rotterdam Rules.[5] In addition, the Commission agreed that work regarding electronic transferable records might include certain aspects of other topics such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.[6]

4. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on various legal issues relating to the use of electronic transferable records, including possible methodology for future work by the Working Group (A/CN.9/737, paras. 14-88). It also considered the work of other international organizations on that subject (A/CN.9/737, paras. 89-91).

5. At its forty-fifth session, in 2012, the Commission expressed its appreciation to the Working Group for the progress made and commended the Secretariat for its work.[7] There was general support for the Working Group to continue its work on electronic transferable records and the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.[8] In that context, the desirability of identifying and focusing on specific types of or specific issues related to electronic transferable records was mentioned.[9] After discussion, the Commission reaffirmed the mandate of the Working Group relating to electronic

---

[1] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 343.

[2] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 250.

[3] Information about the colloquium is available at the date of this document from www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html.

[4] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

[5] Ibid., para. 235.

[6] Ibid.

[7] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 82.

[8] Ibid., para. 83.

[9] Ibid.

transferable records and requested the Secretariat to continue reporting on relevant developments relating to electronic commerce.[10]

6. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the legal issues relating to the use of electronic transferable records. The Working Group confirmed the desirability of continuing work on electronic transferable records and the potential usefulness of guidance in that field and it was widely felt that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, paras. 17-18). Thereafter, the Working Group considered various legal issues that arise during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89). As to future work, broad support was expressed for the preparation of draft provisions on electronic transferable records to be presented in the form of a model law, without prejudice to the decision on the form of its work to be made by the Working Group (A/CN.9/761, paras. 90-93).

II. Organization of the session

7. The Working Group, composed of all States members of the Commission, held its forty-seventh session in New York from 13 to 17 May 2013. The session was attended by representatives of the following States members of the Working Group: Algeria, Armenia, Austria, Brazil, Canada, Chile, China, Colombia, Croatia, Czech Republic, El Salvador, France, Germany, Greece, India, Iran (Islamic Republic of), Italy, Japan, Malta, Mexico, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

8. The session was also attended by observers from the following States: Andorra, Belgium, Democratic Republic of the Congo, Hungary, Indonesia, Kuwait, Oman and Sweden.

9. The session was also attended by observers from the following international organizations:

(a) Intergovernmental organizations: World Customs Organization (WCO);

(b) International non-governmental organizations: American Bar Association (ABA), Comite Maritime International (CMI), European Law Student Association (ELSA), Fédération Internationale des Associations de Transitaires et Assimilés (FIATA), Moot Alumni Association (MAA), New York State Bar Association (NYSBA) and Union Internationale des Avocats (UIA).

10. The Working Group elected the following officers:

Chairman: Sr. Agustín MADRID PARRA (Spain)

Rapporteur: Mr. Atsushi KOIDE (Japan)

11. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.121); and (b) A note by the Secretariat on draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.122).

---

[10] Ibid., para. 90.

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of draft provisions on electronic transferable records.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

13. The Working Group engaged in discussions on the draft provisions on electronic transferable records on the basis of document A/CN.9/WG.IV/WP.122. The deliberations and decisions of the Working Group on these topics are reflected in chapter IV below. The Secretariat was requested to revise the draft provisions to reflect those deliberations and decisions.

IV. Draft provisions on electronic transferable records

A. General remarks

14. The Working Group engaged in a general discussion about its work and reaffirmed that its work should be guided by the principles of functional equivalence and technology neutrality, and should not deal with matters governed by the underlying substantive law. It was noted that its work should generally be in line with existing UNCITRAL texts, take into account the coexistence of electronic and paper-based business practices, and facilitate conversion between those media.

15. It was indicated that rules enabling the use of electronic transferable records would interact with general provisions on the use of electronic transactions, and that further harmonization of those general provisions, in particular through broader adoption of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the “Electronic Communications Convention”), was highly desirable.

16. It was suggested that future deliberations of the Working Group would benefit from a study providing a comparative analysis of substantive laws of various jurisdictions on areas relevant to its work and covering different types of transferable documents or instruments. However, it was indicated that such a study would require significant resources and that in-depth consideration of substantive law issues might be more appropriate at a later stage, if at all.

B. Draft provisions on electronic transferable records

Draft article 1. Scope of application

17. The Working Group then engaged in a discussion on whether instruments that existed only in the electronic environment should be included in the scope of the draft provisions.

18. One view was that they should be excluded as the mandate of the Working Group was limited to transposing what existed in the paper-based environment into an electronic environment and to providing rules that would achieve functional equivalence. It was further noted that a discussion on those instruments would entail matters of substantive law.

19. Another view was that those instruments should be included based on a functional approach. In other words, as long as those instruments performed the same or similar functions as a paper-based transferable document or instrument, they should be included in the scope of the draft provisions. It was noted that such an approach would provide more flexibility in addressing business practices which did not exist in the paper-based environment.

20. The question was raised with respect to the compatibility between the use of electronic transferable records, on the one hand, and the provisions contained in the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931). It was indicated that the paper-based provisions of those Conventions were not compatible with the use of electronic transferable records and therefore bills of exchange, promissory notes and checks should be excluded from the scope of the draft provisions.

21. In response, it was noted that adequate legislative techniques had been developed to address the matter of functional equivalence between written and electronic form. The example of the interaction between the Electronic Communications Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) was mentioned. It was therefore suggested that bills of exchange, promissory notes and cheques should be included in the scope of the draft provisions. It was further noted that establishing functional equivalence to overcome obstacles to the use of electronic means arising from existing provisions requiring the use of paper-based documents, had been a constant goal of the Working Group.

22. With respect to paragraph 2, it was indicated that, at least in some jurisdictions, the application of law devised for paper-based transactions to electronic ones was extensive, and that therefore attention should be paid to avoid excessive pre-emption of that application.

Draft article 2. Exclusions

23. The Working Group agreed that “electronic equivalents of securities” in paragraph 2, subparagraph (a), should be clarified to refer to “electronic equivalents of securities such as shares, bonds and other financial instruments including financial derivatives”.

24. It was said that the phrase “electronic payment methods” in paragraph 2, subparagraph (b), needed further clarification. It was added that particular caution should be taken to ensure that the practice of using electronic transferable records as means of payment would not be excluded from the scope of application. In response, it was explained that that phrase intended to refer to the exclusion contained in article 2, paragraph 1, subparagraph (b), of the Electronic Communications Convention, which was justified by the fact that those areas of the law had already found comprehensive detailed contractual regulation.

Draft article 3. Definitions

25. It was noted that the scope of application contained in draft article 1 depended largely on the definition of electronic transferable records. Thus, the Working Group engaged in a preliminary discussion about the definition of the terms “paper-based transferable document or instrument” and “electronic transferable record” as provided in draft article 3.

26. As to the definition of “paper-based transferable document or instrument”, it was agreed that the general description of transferable documents and instruments contained in article 2, paragraph 2, of the Electronic Communications Convention should be the starting point for discussion and as such, the Working Group approved the definition as provided in draft article 3.

27. As to the definition of “electronic transferable record”, the Working Group agreed that the phrase in square brackets should be deleted.

28. Reflecting the discussion on the scope of the draft provisions (see paras. 17-19 above), differing views were expressed as to the definition of “electronic transferable record”. In particular, proposals were made based on a functional approach, thus encompassing instruments that did not necessarily exist in the paper-based environment but would achieve similar functions, such as to evidence a right to claim performance of obligation and to allow for the transfer of rights with the transfer of the electronic record.

29. In response, a concern was expressed that such an approach could only make reference to a limited number of the functions performed by an electronic transferable record. Furthermore, it was suggested that the definition of an electronic transferable record as evidencing a right to claim performance of obligation touched upon substantive law.

30. Thereafter, it was suggested that the definition of “electronic transferable record” as provided in draft article 3 could be broadened to encompass instruments that did not exist in the paper-based environment by referring to an electronic record that performed the same functions as a paper-based transferable document or instrument. While there was support for this approach, it was noted that such a definition would not clearly identify the functions of a paper-based transferable document or instrument. It was stressed that the definition should refrain from making reference to a paper-based document or instrument to improve clarity and to allow for technological developments.

31. After discussion, it was agreed that the definition of “electronic transferable record” should be broadened by focusing on the key function of transferability and without reference to a paper-based document or instrument. Thus, the Working

Group adopted the working assumption that "electronic transferable record" in the draft provisions would mean "a record used in an electronic environment that is capable of transferring the right to performance of an obligation incorporated in the record through the transfer of that record". In that context, it was noted that draft article 3 provided a definition of "transfer" of an electronic transferable record that meant the transfer of control over an electronic transferable record.

32. It was further agreed that the above-mentioned decision by the Working Group did not in any way imply that the Working Group would prepare substantive provisions for instruments that did not exist in the paper-based environment.

33. As to the definition of "issuer", it was noted that the term should be limited to refer only to the person issuing the electronic transferable record and not to any other entity that may be technically issuing the electronic transferable record on that person's behalf, such as a third-party service provider. Therefore, it was suggested that the words in square brackets should be deleted from the definition with further clarifications that: (a) an issuer could issue an electronic transferable record using a third-party service provider; and (b) such third-party service provider would not fall under the definition of an issuer.

34. It was suggested that examples could be included in the definitions to provide more guidance to the readers. It was further suggested that definitions should be presented in a logical order and not alphabetically to preserve consistency in different language versions.

Draft article 4. Interpretation

35. It was suggested that paragraph 1 should be revised to state that the law would be an enactment of a model law with an international origin. The following text was suggested: "This Law is derived from a model law of international origin. In the interpretation of this Law, regard is to be had to the international origin of such model law and to the need to promote uniformity in its application and the observance of good faith".

Draft article 5. Party autonomy

36. It was indicated that, while the principle of party autonomy was a cornerstone of UNCITRAL texts, its operation in connection with electronic transferable records should reflect the limitations to the use of the same principle in paper-based transferable documents or instruments. The need to respect the principle of numerus clausus was stressed. It was suggested that an approach allowing only derogation from certain draft provisions as a set should be adopted, and that each draft provision should be examined to identify those that could be derogated and varied by agreement. It was stressed that in any case those derogations and variations should not affect third parties.

37. In response, it was said that the principle of party autonomy could still find application in the use of electronic transferable records, and that therefore draft article 5 should be retained in square brackets, pending verification of which provisions could actually be derogated and varied by the parties.

Draft article 6. Information requirements

38. It was clarified that draft article 6 did not prevent the issuance of an electronic transferable record to bearer, as set forth in draft article 16, paragraph 4. It was also explained that the legal consequences of violating the disclosure requirements contained in other law were not a matter dealt in the draft provisions.

Draft article 7. Legal recognition of an electronic transferable record

39. A suggestion was made that draft article 7 should be redrafted as a positive rule. It was also suggested that a reference to the requirements set forth in the draft provisions should be included. However, it was noted that the current draft article stating the principle of non-discrimination was formulated on the basis of existing UNCITRAL provisions that had received numerous enactments, and that the interpretation and application of such rule had not posed any particular issue.

Draft article 8. Writing

Draft article 9. Signature

40. It was recalled that the draft provisions would operate in the framework of the general legislative framework for electronic transactions (see para. 15 above). It was explained that draft articles 7, 8, 9 and 12 reproduced some of those general rules, and it was suggested that such rules should form a separate section of the draft provisions, possibly together with other rules of similar nature, such as those on time and place of dispatch and receipt of electronic communications.

41. It was suggested that, when different formulations of legislative provisions dealing with the same matter were available in UNCITRAL texts, the most recent should be used in the draft provisions, so as to fully benefit from refinements. However, it was noted that several jurisdictions had enacted earlier formulations of UNCITRAL legislative provisions, such as, for instance, those on electronic signatures. In response, it was explained that the insertion of general rules in the draft provisions was meant to provide guidance to those jurisdictions that had not yet adopted general legislation on electronic transactions, but that, in those jurisdictions having already done so, rules specific to electronic transferable records would interact with pre-existing general legislation.

42. With respect to draft article 8, a suggestion was made that information should be accessible so as to be usable for subsequent reference also when contained in an electronic transferable record with no paper-based equivalent.

43. It was suggested that definitions of “electronic record” and “electronic signature”, as well as provisions on electronic signature of electronic transferable records, should be introduced in the draft provisions. In response, it was noted that caution should be taken when departing from existing definitions contained in previous UNCITRAL texts, and that some of the suggested provisions touched upon substantive law.

44. The Working Group agreed that the words “a communication” in draft articles 8 and 9 should be retained outside square brackets while other bracketed texts should be deleted. The Working Group also agreed that draft articles of general nature should be placed together in a separate section.

Draft article 10. Possession

Draft article 11. Delivery

45. The Working Group agreed that draft articles 10 and 11, which established minimum standards on possession and delivery requirements, were generally acceptable, subject to its discussion of draft articles 17 and 19, which dealt with the notions of control and transfer of control.

46. With respect to the words "and endorsement" in square brackets in draft article 11, it was noted that the functional equivalence of endorsement could be achieved through draft articles 8 and 9 on writing and signature without being linked with delivery. Therefore, it was agreed that reference to endorsements would be deleted from draft article 11.

47. While a suggestion was made that draft articles 10 and 11 would be better placed following draft article 19, it was agreed that those draft articles would remain in their place until the Working Group was in a better position to discuss the overall sequence of the draft provisions.

Draft article 12. Original

48. It was explained that article 8 of the UNCITRAL Model Law on Electronic Commerce and article 9, paragraph 4, of the Electronic Communications Convention, which formed the basis of draft article 12, had been drafted to address matters such as originality of contracts, and that the life cycle of an electronic transferable record deserved a different approach. Accordingly, it was suggested that the reference to "final form" in paragraph 1, subparagraph (a), should be deleted.

49. It was explained that the functional equivalent of the paper-based notion of original was of limited practical use with respect to the use of electronic transferable records since all related legal needs could be satisfied by establishing the functional equivalents of the paper-based notions of authenticity, uniqueness, and integrity, which were addressed, respectively, in draft articles 9, 13 and 14. It was also noted that there were some repetitions in draft articles 12 and 14.

50. After discussion, the Working Group agreed to retain only the first part of paragraph 1 and to further consider how such requirements would be met with respect to the use of electronic transferable records once it had discussed the relevant draft articles on uniqueness, integrity and control.

Draft article 13. Uniqueness of an electronic transferable record

51. With respect to draft article 13, it was noted that uniqueness was a notion in the paper-based environment, its aim being to entitle a single holder to the performance of an obligation. In that context, it was suggested that draft article 13 should be either deleted or recast in connection with draft article 17 on control. While it was further suggested that draft article 13 could be merged with draft article 17, it was also stated that there might be merit in retaining draft article 13 as a separate article.

52. The Working Group decided to continue its consideration of draft article 13 when discussing draft article 17.

Draft article 14. Integrity of an electronic transferable record

53. The Working Group agreed that draft article 14 was generally acceptable. With respect to paragraph 2, subparagraph (a), it was agreed that the words in square brackets should be retained outside square brackets.

54. It was explained that changes of purely technical nature, for instance, changes due to data migration, would not affect the integrity of an electronic transferable record and thus should fall under the "addition of any change" referred to in paragraph 2, subparagraph (a).

55. A question was raised whether draft article 12 (see para. 50 above) could include a reference to draft article 14. In that context, it was suggested that draft articles 12 and 14 could be merged. However, it was widely felt that draft article 12, which was a provision aiming at achieving functional equivalence of the paper-based notion of "original", should not make reference to draft article 14 that required integrity of an electronic transferable record as such. It was stressed that "integrity" was a quality not necessarily linked to "original" and one that had to be assured throughout the life cycle of an electronic transferable record.

56. After discussion, it was agreed that draft article 14 should be retained without the square brackets in paragraph 2. It was further agreed that draft articles 12 and 14 should be retained separately.

Draft article 15. Consent to use an electronic transferable record

57. It was clarified that paragraph 1 purely stated the general principle that a person would not be required to use an electronic transferable record, while paragraph 2 dealt with the requirement of parties involved in the use of electronic transferable records to consent to their use. It was further clarified that the word "parties" was used in a generic manner to encompass different types of concerned parties. It was suggested that the consent requirement should be general and not refer to individual draft articles. It was indicated that paragraph 3 dealt with instances whereby the consent of the party would be implied, for example, when the transferee of the electronic transferable record obtained control of that record.

58. After discussion, it was agreed that paragraphs 1 and 3 should be retained in their current form. It was further agreed that paragraph 2 should remain in square brackets yet without making any reference to individual articles in the draft provisions.

Draft article 16. Issuance of an electronic transferable record

Paragraph 1

59. It was generally agreed that paragraph 1 was acceptable. It was further suggested that paragraph 1 would not be necessary if paragraph 2 of draft article 15 were to be retained in the draft provisions (see paras. 57-58 above).

60. It was noted that while the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) ("Rotterdam Rules") required the consent of the carrier and of the shipper for the issuance and subsequent use of an electronic transport record, it allowed issuance of an electronic transport record not only to the shipper, but also to the documentary

shipper or the consignee. It was therefore asked whether, under paragraph 1 of draft article 16, the first holder whose consent was required would be the shipper, or rather the person to which the electronic transferable record was in fact issued. In response, it was explained that under paragraph 1, the first holder could be the shipper, documentary shipper or consignee, as the case would be.

61. It was further explained that in certain cases, a paper-based transferable document or instrument satisfied multiple functions, some of which did not rely on transferability of the document or instrument. For instance, a bill of lading entitled the holder to delivery of goods and also evidenced the contract for carriage of goods by sea between the shipper and the carrier. In such cases, it was suggested that different requirements would apply to achieve equivalence with the various functions of a paper-based transferable document or instrument.

Paragraph 2

62. It was suggested that certain information required for the issuance of a paper-based transferable document or instrument might not necessarily be relevant for an electronic transferable record. It was therefore suggested that the paragraph should be deleted or revised accordingly.

63. It was noted that the information required in an electronic transferable record should correspond to the information required in the paper-based transferable document or instrument whose functions that electronic transferable record aimed at satisfying.

64. It was stressed that one aim of the paragraph was to avoid requesting more information for the issuance of an electronic transferable record than for its paper-based equivalent, which could lead to discrimination against the use of electronic means.

65. The Secretariat was requested to revise paragraph 2 in light of the above-mentioned suggestions.

Paragraph 3

66. It was indicated that, throughout its life cycle, an electronic transferable record might contain information in addition to that contained in a paper-based transferable document or instrument that performed the same functions. It was agreed that a separate draft article should be prepared in light of that consideration.

Paragraph 4

67. It was agreed that paragraph 4 should be revised to clarify that the paragraph intended to enable the issuance of an electronic transferable record to bearer in circumstances where the same would be allowed for a paper-based transferable document or instrument.

Paragraph 5

68. It was widely agreed that paragraph 5 should be deleted as the substantive law would determine the time of issuance of an electronic transferable record. However, noting that the time of issuance had significant implications in business practice, it was suggested that paragraph 5 could be retained and refined to clarify the

interaction between requirements of substantive law, on the one hand, and general rules of electronic transactions law relevant for identifying the time of issuance, on the other hand.

69. After discussion, it was agreed that paragraph 5 in its current form should be deleted, yet with the possibility of introducing a similar paragraph which would not touch upon substantive law.

Paragraph 6

70. After noting that paragraph 6 was a general statement that an electronic transferable record should be subject to control from the time it was issued till when it ceased to have any effect or validity (for example, in accordance with draft article 26), the Working Group agreed to retain paragraph 6 in its current form.

Paragraph 7

71. It was indicated that, while business practices existed where multiple originals of paper-based transferable documents or instruments were issued, no case could be identified where the law required it. It was suggested that the word "permits" should replace "requires".

72. It was explained that the law generally aimed at mitigating the negative consequences of the use of multiple originals. It was also explained that the functions achieved through multiple originals in the paper-based environment could find adequate treatment in an electronic environment with the use of different methods. Accordingly, it was suggested that paragraph 7 should be deleted.

73. However, it was also said that a provision along the lines of paragraph 7 could be particularly useful in case a paper-based transferable document or instrument issued in multiple originals would be replaced with an electronic transferable record. In that respect, it was suggested that paragraph 7 could be recast to state that all holders of a paper-based transferable document or instrument issued in multiple originals should establish control over the resulting electronic transferable record.

74. While recognizing the business practice of issuing multiple originals, it was agreed that paragraph 7 in its current form should be deleted. The Secretariat was requested to provide examples of circumstances where such practices existed and were permitted under substantive law and the functions performed by multiple originals, and possibly identify where a similar provision might be required in other articles of the draft provisions.

Draft article 17. Control

75. In line with its decision (see para. 52), the Working Group considered the draft articles 13 and 17 jointly.

76. With respect to draft article 13, the following suggestions were made: (a) the draft article should remain separate from draft article 17; (b) the phrases in square brackets in paragraph 1 should be deleted; (c) the words "in accordance with the procedure set out in draft article 17" in paragraph 2 should be replaced with the words "whereby the authoritative copy is readily identifiable as such"; (d) the draft article should be recast similar to other provisions on functional equivalence by starting with the words "where the law requires uniqueness". With respect to the last

suggestion, it was questioned whether there were instances in which the law would require uniqueness.

77. It was widely felt that the notion of control should establish the functional equivalence of possession with respect to the use of an electronic transferable record (see para. 45 above) and aim at reliably identifying the holder. In that context, the following suggestions were made with respect to draft article 17: (a) the person in control should be the person with de facto power over the electronic transferable record; (b) de facto power would include among others, the power to deal with or dispose of the electronic transferable record; (c) the person with de facto power may not necessarily be the rightful holder; (d) substantive law would determine whether the person with de facto power was a rightful holder and the rights arising from such status; (e) de facto power could be defined as "fair, lawful and independent" power; and (f) de facto power should not be understood as the technical ability of a registry operator or a third-party service provider to control data stored in an electronic transferable record.

78. It was further explained that the person in control might be able to transfer or dispose of the electronic transferable record though it might not be the rightful holder. It was illustrated that the notion of control over an electronic transferable record could mean the control over the information regarding the electronic transferable record (logical control) or a physical object which would contain such information (physical control).

79. It was suggested that draft article 17 should not include a reference to a person to which the electronic transferable record was "issued or transferred" as the validity of the issuance or transfer of the electronic transferable record would be determined by the substantive law. In response, it was noted that such formulation as seen in paragraph 1 did not pose any practical difficulties.

80. In addition, the following suggestions were made: (a) references should not be made to "an authoritative copy"; (b) the respective definitions of the terms "holder", "issuance", "transfer" and "control" needed to be considered carefully as they were likely to introduce circularity; (c) reference should be made to "exclusive control" instead of "control"; and (d) a discussion of illustrative examples of how "control" might be achieved in practice could shed light on the best way to prepare draft provisions regarding control.

81. After discussion, it was suggested that draft article 17 could read as follows: "A person has control of an electronic transferable record if a method used for evidencing transfer of interests in the electronic transferable record reliably establishes that person as the person which, directly or indirectly, has the de facto power over the record, whereby the uniqueness and integrity of this record are preserved in accordance with draft articles 13 and 14."

82. With respect to paragraph 2, it was suggested that the paragraph should be either deleted or redrafted so as to illustrate methods to reliably identify the person with de facto power over the record. In response, it was indicated that at least some guidance, in a manner fully mindful of technology neutrality, should be provided on when and how a method would meet the reliable standard, and that a drafting technique similar to that employed in the UNCITRAL Model Law on Electronic Commerce and the Electronic Communications Convention could be used to that end. In that context, the authoritative copy approach and the registry approach were

mentioned as methods of achieving reliability. It was noted that the level of reliability would vary depending on the system or types of records and that it was for the parties to choose the level of reliability adequate for their transactions.

83. It was noted that the concepts of "right of control" and "controlling party" used in the Rotterdam Rules should be distinguished from the current discussion on control, as those terms related to the substantive rights of the holder of an electronic transport record (see A/CN.9/WG.IV/WP.122, para. 30).

84. As a drafting point, it was suggested that draft article 17 should be recast similarly to other provisions achieving functional equivalence or merged with draft article 10 to begin with the words "where the law requires the possession," without making any reference to the possession of the paper-based transferable document or instrument. In response, it was noted that even in such case, a link would need to be provided between the "law" and the electronic transferable record, as it would not be a general requirement under law, but rather under the law governing the paper-based transferable document or instrument, the functions of which the electronic transferable record aimed to achieve.

85. After discussion, it was agreed that: (a) the functional equivalence of possession would be met through control; (b) draft article 17 should not touch upon substantive rights conferred to the person with control over an electronic transferable record; (c) the notion of uniqueness and control deserved separate draft articles while reference might be made to each other; (d) the method used for establishing control should be one that identified the de facto holder of an electronic transferable record, while the issue of whether the holder was a rightful holder would be left to substantive law; and (e) consideration should be given to combining draft articles 10 and 17.

Draft article 18. Holder

86. It was noted that paragraph 1 merely repeated the definition of "holder" contained in draft article 3, and it was suggested that that definition would suffice. It was also noted that further work to complete the provision contained in paragraph 2 could lead to interference with substantive law. It was therefore agreed that article 18 should be deleted.

Draft article 19. Transfer of control of an electronic transferable record

87. It was suggested that paragraph 1 should be revised to take into account additional transfer requirements that might exist in substantive law, namely endorsement or agreement. In response, it was indicated that paragraph 1 aimed only at conveying that transferring control of the record was necessary in order to transfer the electronic transferable record. It was suggested that a positive formulation of the draft paragraph should be adopted for the sake of clarity. It was added that substantive law would indicate additional requirements that might need to be satisfied for the transfer of an electronic transferable record.

88. It was clarified that paragraph 2 aimed at making it possible to convert the manner of transmission of an electronic transferable record from "to bearer" to "to a named person" and vice versa.

89. It was noted that the effectiveness of the transfer of an electronic transferable record was a matter governed by substantive law. Accordingly, it was suggested that paragraph 3 should be deleted. In that context, it was also suggested that the draft provisions should not deal with requirements for an effective transfer and consequences of the lack thereof.

90. It was said that paragraph 4 was redundant since draft article 15, paragraph 3, already contained a general rule on the inferral of consent.

91. It was indicated that paragraph 5 might frustrate the function of circulating an electronic transferable record to bearer by introducing a requirement to insert a statement that did not exist in substantive law. It was added that requiring the insertion of that statement could violate technology neutrality if it presupposed the use of a registry model. In response, it was said that consideration should be given on how to record the chain of endorsements in electronic transferable records issued to a named person so as to enable the action of recourse. It was suggested that where the law required an endorsement, this could be achieved in the electronic environment through electronic equivalents of writing and signature in accordance with draft articles 8 and 9 and a separate draft article could be included to indicate this.

92. It was agreed that paragraph 1 should be redrafted taking into account the above considerations and that paragraph 3 should be deleted. It was also agreed that paragraphs 2, 4 and 5 should be revised with a view to accommodating the functional equivalence of both delivery and endorsement in an electronic environment.

Draft article 20. Amendment of an electronic transferable record

93. It was suggested that functional equivalence with respect to amendment of an electronic transferable record could be achieved by introducing a rule indicating that, where the law permitted the amendment of an electronic transferable record, that requirement was met if the amended information was reflected in the electronic transferable record, and if the amended information was readily identifiable as such.

94. It was indicated that two elements had to be present for an amendment to be legitimate, i.e. substantive law authorized the amendment, and the amendment was authorized by the holder of the electronic transferable record.

95. It was noted that paragraph 2 contained a duty of notification to third parties that was a matter of substantive law. It was added that the draft provisions should enable notifications in all cases where such notifications were required by substantive law.

96. Different views were presented on what could constitute an amendment. One view was that an amendment could refer to any change or addition of information contained in an electronic transferable record. Another view was that it referred only to instances where the content of the obligation would change. It was emphasized that for the sake of clarity and to avoid unintended consequences, the meaning of the term “amendment” should be clarified and a clear distinction should be made between a change to the performance obligation and an addition to the electronic transferable record, such as an endorsement.

97. After discussion, it was decided that draft article 20 should be revised taking into account the views expressed above with focus on achieving functional equivalence.

Draft article 21. Error in information contained in an electronic transferable record

98. In response to a query, it was clarified that the notion of input error referred to a typing error made by a physical person when interacting with an automated system. It was noted that the provision on input error contained in article 14 of the Electronic Communications Convention was meant to operate in an environment very different from that in which electronic transferable records were used, and that therefore this provision might not be appropriate.

99. It was decided that draft article 21 should be deleted.

Draft article 22. Division of an electronic transferable record

Draft article 23. Consolidation of electronic transferable records

100. With respect to draft articles 22 and 23, it was indicated that whether an electronic transferable record could be divided or consolidated was a matter of substantive law, which would also set out the relevant requirements. Accordingly, it was said that those articles should operate only when it was permitted under the substantive law. It was added that consideration should be given to the fact that the electronic environment would make it easier for division and consolidation to take place.

Draft article 24. Replacement

101. With respect to draft article 24, the following suggestions were made: (a) a replacement would require the consent of any party with the obligation to perform, which would be determined by substantive law; (b) the obligor would, in any case, be in a position to require a replacement upon presentation for performance; (c) the requirement in subparagraph 2 (b) that all information should be included should also be mentioned in subparagraph 1 (b); (d) the possibility of prior consent to replacement (for example, upon issuance) should be taken into consideration; and (f) paragraph 3 should be recast as a general rule in a separate draft article.

Draft article 25. [Surrender] [Presentation for performance]

102. With respect to draft article 25, the following suggestions were made: (a) the draft article could be construed to achieve the functional equivalence of the general term “presentation”; (b) there might be additional requirements under the substantive law for presentation for performance, for example, to demonstrate that it was the rightful holder as well as to show the chain of endorsements; (c) the draft article could be deleted as draft article 11 on delivery was sufficient; (d) as long as there was a procedure for the holder to demonstrate that it was the holder, the draft article would not be necessary; and (e) there was merit in retaining the draft article as the notions of “surrender” or “presentation for performance” were different from the notions of “presentation” or “delivery.”

Draft article 26. Performance of obligation

103. It was agreed that draft article 26 should be deleted as it dealt with matters of substantive law.

Draft article 27. Termination of an electronic transferable record

104. It was noted that when an electronic transferable record ceased to have effect or validity was a matter of substantive law and that draft article 27 should merely enable the operation of substantive law in an electronic environment. However, it was also explained that the draft article merely aimed at achieving the functional equivalence of "destruction" of a paper-based transferable document or instrument, without touching upon issues of validity of the electronic transferable record. It was suggested that the draft article should be revised to convey that idea more appropriately.

Draft article 28. Security right in an electronic transferable record

105. With respect to draft article 28, the following suggestions were made: (a) as the creation of a security right in certain types of paper-based document or instrument was governed by the law applicable to such document or instrument, reference should also be made to the applicable law; and (b) the draft article should not be limited to "creation" of a security right and thus could be revised to state along the following lines: "A reliable procedure to allow the use of an electronic transferable record for security right purposes shall be provided."

Draft article 29. Archiving information in an electronic transferable record

106. With respect to draft article 29, the following suggestions were made: (a) reference should be made to "retention" rather than "archiving"; (b) subparagraph 1 (b) should focus on the integrity of the record rather than the format; and (c) the possibility of dealing with the electronic retention of paper-based transferable documents or instruments could be further explored.

Draft articles 30 to 33: Third-party service providers

107. With respect to the draft articles dealing with third-party service providers, it was generally felt that those provisions were too detailed and might not fully respect the principle of technology neutrality. It was added that those draft provisions had a regulatory nature and their effect could hinder competition. It was explained that such matters were usually addressed contractually for exchanges taking place in closed systems, while guidance might be needed for those exchanges taking place in open systems. It was indicated that, if need to provide guidance in that field was felt, due attention should be given to the recent relevant texts, such as article 19 of the Proposal for a Regulation of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market, dealing with requirements for qualified trust service providers.

108. It was suggested that draft article 31, subparagraph (1)(c)(ii) should be deleted. It was also noted that the term "valid" contained in draft article 31 was unclear.

109. It was widely felt that draft article 33 dealt with matters of substantive law outside the scope of the current work and thus should be deleted.

110. After discussion, it was agreed that the draft provisions dealing with third-party service providers should be revised in light of the considerations expressed above, mindful of technology neutrality.

Draft article 34. Recognition of foreign electronic transferable records

111. It was widely felt that the draft provisions should not displace existing private international law rules applicable to paper-based transferable documents or instruments. However, it was added, the legal treatment of certain issues specific to the use of electronic transferable records, such as the possibility to discriminate a foreign electronic transferable record by virtue of its origin only, might deserve additional consideration. It was agreed that draft article 34 should be revised with a view to narrowing its scope to matters purely related to the use of electronic means, and without displacing general rules on conflict of laws.

C. Future work

112. It was noted that, while it was premature to start a discussion on the final form of work, the draft provisions were largely compatible with different outcomes that could be achieved. However, it was also said that caution should be exercised in providing texts that had practical relevance and therefore supported existing business practices, rather than regulated potential future ones.

113. The view was expressed that the Working Group should deal in depth with certain cross-cutting issues relevant also for the treatment of electronic transferable records, such as time-stamping and archiving.

114. The Working Group was informed that Germany had recently enacted amendments to its commercial code allowing for the use of negotiable electronic transport records.

V. Technical assistance and coordination

115. The Working Group heard an oral report on the technical assistance and coordination activities undertaken by the Secretariat, including the promotion of UNCITRAL texts on electronic commerce. In particular, ongoing coordination with UN/CEFACT was mentioned. Particular reference was made to promotional and coordination efforts in the Asia and Pacific region, including the contribution of UNCITRAL to the preparation of a draft arrangement/agreement on paperless trade facilitation promoted by United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP) in the framework of the implementation of UN/ESCAP resolution 68/3.

VI. Other business

116. The Working Group was informed that the forty-eighth session was scheduled to take place in Vienna from 9 to 13 December 2013, subject to the decision by the Commission at its forty-sixth session (8-26 July 2013) and confirmation by the conference management services of the United Nations Secretariat.